

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA

EASTERN DIVISION

RICHARD P. METTKE,

Plaintiff,

vs.

No. 98-PT-596-E

TOUCHNET INFORMATION SYSTEMS,

INC.,

Defendant.

THE DEPOSITION OF JOHN F. MURPHY, produced,  
sworn and examined on behalf of the Plaintiff pursuant  
to Notice, between the hours of eight o'clock in the  
forenoon and six o'clock in the afternoon of Tuesday,  
June 16, 1998, at the law offices of Spencer, Fane,  
Britt & Browne, 1400 Commerce Bank Building, 1000  
Walnut, in the City of Kansas City, in the County of  
Jackson and State of Missouri, before me,

LYDIA HURLEY, RPR  
BOWEN MOTTER REPORTING  
911 MAIN, SUITE 1930  
KANSAS CITY, MISSOURI 64105

a Notary Public in and for Jackson County, Missouri,  
in a certain cause now pending in the United States  
District Court for the Northern District of Alabama,  
Eastern Division, wherein RICHARD P. METTKE is  
Plaintiff and TOUCHNET INFORMATION SYSTEMS, INC., is  
Defendant.

A P P E A R A N C E S

For the Plaintiff:

Tobor & Goldstein  
1360 Post Oak Blvd., Ste 2300  
Houston, Texas 77056-3023  
By Mr. John T. Polasek

For the Defendant:

Spencer, Fane, Britt & Browne  
1000 Walnut, Suite 1400  
Kansas City, Missouri 64106  
By Mr. Richard P. Stitt



S T I P U L A T I O N S

It is hereby stipulated and agreed by and between the parties herein that presentment to the attorneys of record of a copy of this deposition shall be considered submission to the witness for his signature within the meaning of Federal Rules of Civil Procedure; but shall in no way be considered as a waiver of the witness' signature, and is to be signed at any time before the time of trial; and if not signed by time of trial, may be used with the same force and effect as if signed.

I N D E X

WITNESS: PAGE

JOHN F. MURPHY

Examination by Mr. Polasek

Examination by Mr. Stitt

Further Examination by Mr. Polasek

SIGNATURE:

CERTIFICATE:

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JOHN F. MURPHY,

a Witness, of lawful age, being produced, sworn and  
examined on behalf of the Plaintiff, deposeeth and  
saith:

EXAMINATION

BY MR. POLASEK:

Q Mr. Murphy, would you state your name for the  
record?

A John F. Murphy.

Q Mr. Murphy, have you been deposed before?

A No.

Q Okay. First time?

A Yes, it is.

Q Well, I am sure you have had an opportunity to  
talk to your counsel today to discuss what we are  
going to be doing here, but I think I will go  
through a couple of the ground rules so to speak.  
First, is that the court reporter just gave you  
the oath. I will represent to you that it is the  
same oath that you would take down at the  
courthouse, meaning it has the same force and  
effect as if you were testifying in front of the  
judge. Do you understand that?

A Yes, I do.

Q Great. Second of all, in response to my



1 questions, if you would, answer yes or no or give  
2 an explanation as needed as opposed to a nod of  
3 the head or uh-huh or a huh-uh.

4 A Okay.

5 Q Excellent. And if you need to take a break at  
6 some point in the deposition, please let me know.

7 A Okay.

8 Q It is my understanding that you are an employee of  
9 TouchNet Information Systems?

10 A Yes, I am.

11 Q Okay. How are you employed with TouchNet?

12 A My title is vice president of market development.

13 Q And what does the vice president of market  
14 development do?

15 A I do a combination of deciding what markets we go  
16 into. I sell into the markets and I help  
17 determine strategy for what the company does.

18 Q And how long have you been in this position?

19 A This position, since I think 1992.

20 Q And prior to that, how were you employed with  
21 TouchNet?

22 A I was hired in May of 1990 as marketing manager.  
23 And my job as marketing manager was to help  
24 determine what business we should be in and also  
25 be a salesman to sell our solution.



1 Q Are you from Kansas or Missouri?

2 A I grew up in St. Louis. Moved to Kansas City 13  
3 years ago two days ago.

4 Q Do you have a college degree?

5 A I have a bachelor of science in business  
6 management from the University of Missouri,  
7 graduated 1985, emphasis in finance.

8 Q Any postgraduate degrees?

9 A No.

10 Q I am going to show you what is marked as Exhibit 2  
11 and ask you if you have seen this document before?

12 A Yes, I have.

13 Q Okay. This is TouchNet's answer to interrogatory  
14 No. 1, correct?

15 A Yes, it is.

16 Q On page 5 of the interrogatory answer, you are  
17 listed as one having personal knowledge of the  
18 information in this answer. Can you tell me what  
19 information you supplied in responding to this  
20 interrogatory?

21 A I supplied a copy of the videotape. I supplied  
22 letters that I had sent to BellSouth. I supplied  
23 invoices on the video production work and I think  
24 some other documents.

25 MR. STITT: Roll back a page.



THE WITNESS: Billing invoice for VPR

Creative Group. And, as I said, letters to  
BellSouth offering for sale our service.

Q (By Mr. Polasek) Okay. On page 6 there's a  
verification. Is that your signature there?

A Yes, it is.

Q In Mr. Toughey's deposition that we just completed  
a few minutes ago, he testified that pay-as-you-go  
access to the internet was not available on  
TouchNet or, in fact, is still not available on  
TouchNet terminal. Do you agree with that?

A I agree with that.

Q He indicated that TouchNet has current plans to  
release or activate such a model in the very near  
future?

A I agree with that.

Q Within the next 30 days or so?

A I don't know the timing.

Q Do you know where this particular model will be  
utilized?

A Primarily in airport locations.

Q Do you have any models that are so equipped but  
not operating in place at the present time?

A Yes, we do.

Q Can you tell me where?



1 A Oh, they are in airports across the country. For  
2 example, St. Louis Lambert International Airport,  
3 Orlando International Airport.

4 Q Kansas City Airport?

5 A In Kansas City we have kiosks operating, yes, but  
6 they do only pay-per-use fax services.

7 Q And pay per use fax services is what TouchNet has  
8 been in for the past several years, correct?

9 A Correct. We have done pay-per-use facsimile  
10 services really since 1989 and adding pay-per-use  
11 access to on-line services has really been  
12 available since I think the early '90s. And I  
13 know for a fact in 1992 and 1993 we had the  
14 capability of doing that.

15 Q I would like for you to take a look at what has  
16 previously been marked as Exhibit 4. That is your  
17 affidavit.

18 A Oh, right here.

19 Q If you want to take a minute to look at that, I  
20 have some questions about some of the -- I have a  
21 few questions about the affidavit as well as some  
22 questions about the exhibits attached to it.

23 A Okay. I'm ready.

24 Q When did access to Prodigy become a service that  
25 was on the TouchNet terminal?



1 A When was it --

2 Q When was it first available for use by a user of  
3 the terminal?

4 A I'm not sure when Prodigy was first available as a  
5 commercial on-line service. It could have been  
6 available on an earlier version of our software  
7 that would even be back in 1991. My first  
8 recollection of one of our kiosks showing Prodigy  
9 working on it was at a trade show in 1993.

10 Q In May of 1993?

11 A Yes. Because May of 1993, my recollection was at  
12 a SuperCom trade show in Chicago.

13 Q Okay. And if you would take a look at the letter  
14 that is dated June 11th '92 and the attachments to  
15 that particular document, that seems to indicate  
16 that Prodigy access was available?

17 A And the answer is yes, it would have been and yes,  
18 it was.

19 Q Okay. Well, just a minute ago you testified that  
20 the first use on the terminal was in May of '93?

21 A No.

22 Q I am trying to understand.

23 A I misunderstood the question. The Prodigy  
24 software has been available for access on the  
25 public terminals since 1992. The first time I





remember showing it at a trade show was in 1993.

That's the question I thought you asked.

Q When was it first placed on a TouchNet terminal?

A I don't recollect the exact date, but I know that we had Prodigy in our office as a software in, again, the early '90s. I would guess it would be 1992.

Q When you say we had it in the office, are you talking about on your own PC or something at the office as opposed to a terminal that was for use by the average user on the street?

A Well, certainly we had it in our office as something to be used by office personnel. And that same software that we had in 1992 was available to launch external programs, one of them could have been Prodigy.

So the way I see it, we had Prodigy available and Prodigy could have been launched by our terminals. That is why we were offering to sell it because we had the ability for launching on-line services at that time.

Q Okay. Referring back to your June 11, 1992, letter, I noted it is unsigned.

A Oh, this is my original copy. This is my copy of it.



1 Q Do you have a copy of the signed original -- of  
2 the signed letter?

3 A No, I don't.

4 Q Is there any way -- where did you get a copy of  
5 this letter?

6 A From my files.

7 Q When you say your files, was it on your computer  
8 files or was it in --

9 A No.

10 Q -- correspondence file?

11 A It was in a paper file. This letter was written  
12 in 1992, you know, on an old version of Windows on  
13 a computer I don't have anymore on an old version  
14 of Word that I don't have anymore. The originals,  
15 you know, we have correspondence, you know, in my  
16 job offering these things for sale to a lot of  
17 people. I had a lot of correspondence. A lot of  
18 that over the years has been thrown away. It just  
19 so happened that I kept a file that had some  
20 BellSouth things and I was able to find a copy  
21 that I had sent.

22 Q Since it is unsigned, do you have any additional  
23 documentation that would show that this letter was  
24 actually sent to Mr. Funk?

25 A No, I don't. But if the question is did I send



1 this letter, I sent the letter.

2 Q Okay. And how do you know that you sent the  
3 letter?

4 A Because I wouldn't have a copy of it if I wouldn't  
5 have had completed it and sent it.

6 Q Are you saying that you never retained working  
7 drafts of letters?

8 A Correct. Normally I don't. That is why I have  
9 very few copies, because most of my correspondence  
10 was saved on computer hard drives. The fact that  
11 I don't have a signed copy of this doesn't mean  
12 that I didn't send it. In fact, I have an idea  
13 why this might not be signed. I had a computer  
14 modem, fax modem. It is possible that this was  
15 faxed directly from my computer and then printed  
16 out copy later.

17 Q Okay. If that is the sequence of events that did  
18 occur, would you have some document, a hard copy  
19 of a fax transmission report or something of that  
20 nature?

21 A No, because if it went directly from my computer,  
22 it would just be software sending this file out  
23 and I -- then I printed the file out. I would  
24 have printed the file out afterwards.

25 Q Is there any way to ascertain -- if that sequence



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1 of events did occur, is there any way to ascertain  
2 whether Mr. Funk got a copy of the letter?

3 A Well, I think we probably could look at all the  
4 history of long distance services to whatever his  
5 fax number was in June of 1992. I would think  
6 there would be a copy, there would be a record.  
7 But I have no knowledge if he picked up the fax on  
8 the other side of the fax machine, if he --

9 Q Okay. I would like for you to take a look at the  
10 next letter that is attached to your declaration.  
11 That is a July 13, '92, letter?

12 A Correct.

13 Q The first line references Information Services  
14 Gateway which is to be launched in Orlando. Do  
15 you recall what that refers to?

16 A Yes, BellSouth. This is a subset of BellSouth,  
17 this company, Linda Coyner worked for a division  
18 of BellSouth that was going to be putting out a  
19 service in Orlando that they were calling the  
20 Information Services Gateway. That is my  
21 recollection of it.

22 Q They were putting out a service?

23 A BellSouth was putting out -- they were putting out  
24 enhanced fax services. If it wasn't BellSouth, it  
25 was another company that was going to be doing a



1 trial of enhanced communication services in  
2 Orlando. This letter -- in fact, this one was  
3 obviously printed out because it is on our  
4 letterhead that I had sent -- I had sent her an  
5 article on the fact that I had seen that their  
6 service was going to be launched in Orlando and  
7 then I was saying that our services could be  
8 another add-on to their services.

9 Q In addition to the services that they offered?

10 A Correct.

11 Q Okay. And the services that they were offering  
12 were fax services?

13 A I think the services that they were offering were  
14 not only fax but also other messaging services.

15 Q You mean e-mail?

16 A I don't know if it was e-mail. I know that they  
17 were offering other messaging services. They were  
18 -- most of them were going to be telephony based.  
19 In fact, one thing I do remember they were going  
20 to offer was the ability of having all of your  
21 birth dates in a system and it would call you to  
22 tell you to remind you that there was a birthday  
23 coming up. Now, that's very small subset of my  
24 recollection of what the whole Information  
25 Services Gateway was.



1 Q Okay. The third paragraph references or says  
2 that, "We also have the ability to work with you  
3 on offering a special interface, credit card, and  
4 billing structure for your customers. It makes no  
5 sense to have the capability of your platform and  
6 have people reluctant to use it because they don't  
7 understand the conventional pay fax purchase or  
8 are turned off by the high prices charged to  
9 access the services."

10 The services that you are -- what services  
11 were you referencing there in that particular  
12 paragraph of your letter?

13 A The specific service I was referencing there was  
14 they had a fax mailbox system. I don't recall the  
15 exact name of it, but they were going -- we had  
16 told them they could put out special cards, that  
17 there could be a billing system, that their users  
18 could go to any of our kiosks and insert their  
19 card, we could read the card, go into their  
20 network, which essentially was over the network  
21 that stored a file someplace and bring it -- that  
22 stored this fax image and bring it back as a file  
23 and be able to print it out.

24 So specifically what I was talking about is  
25 we would be able to create an interface from our



1 kiosks that would be able to read a special card  
2 that would be like their billing card to be able  
3 to access this. And so we would be able to know  
4 from the card what they were currently using and  
5 what their mailbox was.

6 Q Okay. That was to basically print a document that  
7 they had previously prepared?

8 A Or a document that had been faxed to them. Or  
9 once we got into their intelligent messaging  
10 system to be able to access any service that they  
11 put out on.

12 Q And TouchNet charged for that service? Would it  
13 charge for that service?

14 A Well, we were trying to sell these to BellSouth.  
15 So BellSouth would have decided what they would  
16 have charged for the service. The capability of  
17 charging for the service existed. We had the  
18 ability of launching programs that had  
19 intelligence to go out and, you know, look at a  
20 card and validate not only credit card but other  
21 cards. And our customers really were in charge of  
22 deciding what they were going to do, how deep they  
23 wanted to validate it.

24 Q All right. There's a handwritten note in the  
25 lower right-hand corner?



1 A Uh-huh.

2 Q It looks like your name signed below it?

3 A Yes.

4 Q Can you tell me what Funnybone fax is?

5 A Funnybone fax was a fax template that was a  
6 service that we had on our machines that you could  
7 select from a selection of cards, personalize it  
8 by typing in the information and essentially print  
9 it out and then pay for it and then send the fax  
10 someplace else. Linda -- I think I printed out  
11 one that -- there is one I used to send quite a  
12 bit that showed that she was like the deal maker.  
13 And so what I did was I sent a printed one out to  
14 show her, this would be another service,  
15 pay-per-use service that we could offer that could  
16 be faxed.

17 Q Do you recall when the spring '93 COMDEX show took  
18 place?

19 A It was in Atlanta and it was either the first week  
20 of June of 1993 -- I could -- I know it was in  
21 Atlanta that summer, and I think it was in the  
22 first part of June. I could probably look here.

23 Q I am glad you referred to it as that summer even  
24 though it is labeled the spring show.

25 A Oh, well, that's not my choice of terms. COMDEX





1 chooses what they call their show. They had  
2 always called their fall show the fall show and  
3 then when we added spring it depended on when the  
4 date was available. It was at Georgia World  
5 Congress Center.

6 Q But your best recollection is that it occurred in  
7 June of '93?

8 A Correct.

9 Q I asked Mr. Toughey in the deposition that we took  
10 earlier today if he could identify anyone that had  
11 received a copy of what we have marked as Exhibit  
12 5 for your reference. For your reference, Exhibit  
13 5 was the video that you, through your attorneys,  
14 have previously supplied to us. Can you give me a  
15 list of names of people that have received a copy  
16 of this video?

17 A I do not have a list of names. Certainly when you  
18 are at COMDEX, there are hundreds of thousands --  
19 there is 200,000 people at the conference  
20 streaming by at all times that we were meeting  
21 giving them copies of our videotape. I don't have  
22 a sign up record or a distribution list, just like  
23 I don't have a list of everybody I have ever given  
24 a brochure to or a, you know, a piece of flier  
25 material.



1 Q Sure. Has this video, which has been marked as  
2 Exhibit 5, been given to people outside of the  
3 COMDEX shows?

4 A My recollection is yes.

5 Q Would you have a written record of whom -- of the  
6 people that you have given or that TouchNet has  
7 given a copy of this video to?

8 A No, I don't. About all I can say to that is the  
9 majority of my correspondence was not printed out.  
10 It was on computer hard drives. You know, that  
11 was three operating systems and probably five  
12 computers ago. Maybe not the exact number, but  
13 certainly it would not make sense to go to the  
14 cost of making a videotape and not hand it out to  
15 anybody.

16 Q In your affidavit, page 3, Paragraph 9, you refer  
17 to several places in which a TouchNet terminal was  
18 located and operating. Do you see that paragraph?

19 A Yes, I do.

20 Q As I understand that paragraph of your affidavit,  
21 terminals were located at the places so listed in  
22 here at the time that this video was prepared?

23 A Yes.

24 Q And the video has a date of production of May 14,  
25 1993?



1 A Yes.

2 Q So that means that these terminals that were at  
3 the places you have listed in Paragraph 9 were in  
4 operation prior to May 14 of '93, correct?

5 A Yes.

6 Q Did those terminals have access to Prodigy?

7 A To my recollection, yes.

8 Q Did those terminals -- were you able to access the  
9 internet from those terminals?

10 A My recollection at the time -- Prodigy did not  
11 have a gateway to the internet, because my  
12 recollection at that time, the internet was really  
13 only available on military bases and on college  
14 campuses. It was not a commercial -- it was  
15 before the world wide web. We were accessing  
16 Prodigy, though, which was an on-line network that  
17 had the ability of linking to whatever Prodigy had  
18 access to, and they had other services that could  
19 be accessed through Prodigy in 1990 -- the summer  
20 of 1993.

21 Q So whatever services that Prodigy had access to,  
22 the user had access through the use of this  
23 terminal?

24 A Yes.

25 Q When did Prodigy gain an access to the internet?



1 A Oh, I don't know when Prodigy -- I don't know when  
2 Prodigy provided --

3 Q Became a --

4 A If you look at it this way, the internet is just  
5 -- the internet is a colloquial term that stands  
6 -- there is a protocol called TCP/IP and IP is the  
7 internet protocol that lets computers talk back  
8 and forth. In 1993, TCP/IP was not widely spread  
9 out. And so an on-line service like Prodigy used  
10 its own proprietary on-line communications  
11 protocol that we were able to use. But the fact  
12 that we were able to dial up and access Prodigy,  
13 if Prodigy would have used TCP/IP at that time and  
14 spent time on the internet, we would have used  
15 TCP/IP.

16 Q If it had been available? Well, I mean, if the  
17 access had been available?

18 A True. If Prodigy decided to have that be one of  
19 the pathways in. It is --

20 Q Right.

21 A I am not a Prodigy expert on their back-end  
22 architecture, but it wouldn't surprise me that  
23 Prodigy in some of their internal workings may  
24 have used TCP/IP to use data around a network,  
25 hence it would have been the internet as it was in



1 1993.

2 Q But that was not available to the users of one of  
3 your terminals?

4 A Well, if the users of our terminal came up to use  
5 Prodigy and they got Prodigy mail, I don't know  
6 how Prodigy sent mail among the different systems,  
7 it is very possible that in their backbone they  
8 could have used the internet working protocol  
9 TCP/IP. And if that is the case, they would have  
10 been using Prodigy and using what at the time was  
11 internet protocols.

12 Q Okay. You don't know if that was the case back in  
13 May or prior to May of '93, which was when this  
14 video was shot?

15 A Right. I don't -- right. I don't know the full  
16 technical extent of Prodigy's backbone. It is  
17 reasonable to assume that Prodigy on their  
18 backbone used the same types of communications  
19 that has evolved into the internet.

20 Q Do you recall meetings with personnel from Prodigy  
21 in which TouchNet supposedly offered a  
22 pay-as-you-use billing system for access to  
23 Prodigy before it had access to the internet?

24 A I was not involved in any face-to-face meetings,  
25 but I was involved in telephone conversations with



1 Prodigy.

2 Q Were you involved in conversations in which  
3 alternative billing systems were discussed?

4 A To my recollection, yes.

5 Q Well, specifically, do you recall discussing with  
6 people with Prodigy a billing system in which a  
7 user would insert his credit card into the  
8 terminal and be billed on a per-minute basis per  
9 his use or her use of the terminals access to  
10 Prodigy?

11 A Right.

12 MR. STITT: Excuse me. Did you say  
13 permanent basis?

14 MR. POLASEK: Per minute.

15 MR. STITT: Per minute. Excuse me. My,  
16 such a deal.

17 THE WITNESS: The intent ultimately was  
18 for Prodigy to have access on our machines and the  
19 intent was for us to be able to sign up new  
20 subscribers for Prodigy and for Prodigy users to  
21 be able to use our machines and pay us the time  
22 that they were using our machines to be able to  
23 access the service for the trial. Because we  
24 wanted to see if people would use this and we did  
25 not want to scare them away, we did not charge the



1 users to use the service.

2 Q (By Mr. Polasek) It was my understanding at the  
3 time that you had subscribers, they were people  
4 that were already subscribers to Prodigy?

5 A Meaning that could walk up and use the machine?

6 Q They could walk up and use the machine?

7 A Yes.

8 Q Or I guess access it from their own PC?

9 A Yes.

10 Q Okay. And were these discussions to the effect  
11 that TouchNet was going to charge such people for  
12 use of the TouchNet terminal while they are  
13 accessing Prodigy on a per-minute basis?

14 A Yes. That goes back to our original design that  
15 we could launch on-line services and have us as  
16 owners of the machines be compensated for that.  
17 Specifically for Prodigy, the discussions were  
18 that for the trial period that Prodigy was  
19 available on these machines, we would let people  
20 access it for free.

21 Q Did you ever actually implement the system where  
22 they were charged on a per-minute basis?

23 A No, we did not, but that was not to say that we  
24 couldn't do it. It was -- you have to look back  
25 to 1993. There was not many Prodigy members and



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1 it was a service, while available, it was not  
2 commercially viable for us to be -- for users to  
3 be doing it.

4 Q Do you recall any of the Prodigy people that you  
5 had these discussions with?

6 A There was a man named Dennis Lostenberger  
7 (phonetic), who is long since gone from Prodigy.  
8 And there was another guy who left Prodigy during  
9 the time that we were doing this. Again, you have  
10 to put it in context. Prodigy has all of these  
11 services. Prodigy -- we even had one up in  
12 Canada. I mean, they were technically viable but  
13 commercial failures.

14 Q And you are talking about accessing Prodigy or  
15 iNet?

16 A I am talking about Prodigy in and of itself. The  
17 fact is, we could access Prodigy, an on-line  
18 service. The fact is we could charge for that  
19 access. The fact is, we chose not to turn on the  
20 charging during the trial.

21 Q Okay. Now, again, this is back before you could  
22 access the internet from your terminal?

23 A Don't confuse the internet with Prodigy. The  
24 internet is really just a communication protocol.  
25 What we now term the internet -- when people say





1 the internet, they really mean on-line services,  
2 access to e-mail, access to information. That's  
3 what we were doing on Prodigy. Now, the internet  
4 just so happens to be using the internetworking  
5 protocol IP you can get at web sites, you can get  
6 at America On-Line, you can get at Prodigy, which  
7 probably still exists in some format, but we  
8 accessed what was commercially on-line available  
9 in 1993.

10 Q But you were limited to what Prodigy had within  
11 their library, so to speak?

12 A Correct. We were -- the service that we used, the  
13 commercial on-line service was what Prodigy had,  
14 that is what at the time we had on. If there was  
15 another service that wanted to be on our system  
16 that used the internet, as it were, to get mail or  
17 other services, we could have done that also and  
18 charged for it. The fact is we used Prodigy, and  
19 Prodigy at the time used dial-up.

20 MR. POLASEK: Why don't we take a short  
21 break for a few minutes. Let me look at some of  
22 my notes.

23 (Whereupon, a break was taken.)

24 MR. POLASEK: I don't believe I have any  
25 more questions at this time.



THE WITNESS: All right.

EXAMINATION

BY MR. STITT:

Q Mr. Murphy, in your affidavit, I believe that is marked as Exhibit No. 4, there are videos referenced which were, according to your testimony, distributed at the COMDEX convention. Do you have any recollection of how many videotape copies of Exhibit 5 were manufactured?

A My recollection is a box of them, you know, a box that was big enough for me to carry to the trade show. My recollection would be in the hundreds if not more.

Q All right. Well, did you throw any of these tapes away?

A It is -- I have no recollection of throwing tapes away, but they were in our supply closet. And as we grew as a company, this was not something that we -- I guess I should say I don't know what happened to whatever was left over from the trade shows.

Q Okay. You have a guess of how many were left over from the trade shows? Of the ones you took to the spring COMDEX, how many did you come back with?

A I don't have a recollection, but I do remember



1 giving out a lot of videotapes.

2 Q Would you say it is more than 20?

3 A Yes, more than 20.

4 Q More than 30?

5 A I would say myself, personally, I gave out  
6 probably ten a day at the shows and there were  
7 other people giving them out too. So while I  
8 would have given out more than 30, I would guess  
9 that the number given out by other TouchNet  
10 employees would be, again, a wild guess. I would  
11 think it would be over 100.

12 Q What kind of person were these given to? Were  
13 they people who could purchase a kiosk if they  
14 wanted?

15 A Correct. Generally, we wanted to give them to  
16 prospects, not to people -- they were expensive  
17 collateral material. We didn't hand them out to  
18 anybody who wanted them. We handed them out to  
19 somebody who we would hope would become a  
20 customer.

21 Q All right. You have stated during your testimony  
22 that TouchNet devised, installed on it Prodigy  
23 software; is that correct?

24 A Yes.

25 Q Do you recall specifically whether or not during



1 the negotiations with Prodigy that it was offered  
2 to them optionally as a pay-per-use charge format?

3 A Specifically --

4 Q Is my question clear?

5 A Well, specifically, that was a decision that we  
6 made because the machines were ours. Prodigy  
7 wanted the software on our machines, and we made  
8 the decision not to charge for the specific  
9 access. We could have just as easily made the  
10 decision to charge for it. And we told Prodigy  
11 one reason we were interested in the relationship  
12 was to help Prodigy sign up new members and for  
13 TouchNet to generate usage revenue by having  
14 access to Prodigy.

15 Q All right. Was it demonstrated to Prodigy that  
16 pay-per-use option was available to them?

17 A Yes, it was.

18 Q Was the machine capable of putting that  
19 pay-per-use charge into effect?

20 A Yes, it was. The software was designed to -- per  
21 each application, it could have a payment amount  
22 that could be charged by service or by minute or  
23 by some minimum plus some other tick charge for  
24 the Prodigy software. We chose essentially to put  
25 in the price as zero.



1 Q Let's turn to the internet now. If I want to sign  
2 on to the internet by any computer, who will  
3 charge me for that, for signing on to the  
4 internet?

5 A If you wanted to have access to files that are on  
6 other computers and you wanted to do it over the  
7 so-called internet, you would get an account with  
8 an internet service provider or you could open an  
9 account with America On-Line or Prodigy or any  
10 other on-line service.

11 Q So I can't sign on to the internet and have the  
12 internet charge me for that service, can I?

13 A Correct. The internet is not a service. The  
14 internet is colloquially known -- it is a series  
15 of protocols that route messages across phone  
16 lines to different computers.

17 Q In fact, the internet was initiated by the Central  
18 Science Foundation, isn't it?

19 A Right. The history of the internet goes back to  
20 the internetworking property called IP, which is a  
21 protocol that networks of computers talk to other  
22 networks of computers. It was developed for  
23 military and educational institutions to share  
24 data across different types of computers. The  
25 internet -- now people think of the internet as a



1 list of services and files and sites and  
2 essentially those sites are on computers like they  
3 always have been. They can still be accessed  
4 using TCP/IP, but the internet is not a service.

5 Q It is not a -- the internet is not a pay-per-use  
6 service, is it?

7 A No, it is not.

8 Q In fact, if I could get my computer to sign  
9 directly on to the internet, I would be in  
10 communication with nothing. Let me rephrase the  
11 question.

12 A Yeah.

13 Q There is no one operating an internet to charge me  
14 on a pay-per-use basis, right?

15 A I think what you are asking is -- huh. The  
16 internet, right, is not a pay-per-use service.  
17 You can pay a provider that you can log into their  
18 computer that will let you send messages from or  
19 get files from other computers.

20 Q And so the only service they can charge me when I  
21 sign on on-line is a Prodigy or a CompuServe or  
22 one of the entities that we have classified as an  
23 ISP, internet service provider; is that correct?

24 A That is correct. If you as a consumer wanted to  
25 have access to files on other computers over the



1 internet, you would pay an ISP, internet service  
2 provider, you would pay an on-line service to  
3 provide you access. Persons at colleges, their  
4 college already has a connection out to the  
5 internet, so I suppose that they are paying a  
6 tuition to the college which would, you know, have  
7 that connection available.

8 Q And so, in fact, the internet is really just  
9 another service option offered by an on-line  
10 service such as Prodigy or CompuServe; is that  
11 correct?

12 A If you log on to an on-line service like Prodigy,  
13 you are using your computer to talk to Prodigy or  
14 your computer to talk to AOL and you can get the  
15 content that AOL or Prodigy has, but then you can  
16 also link from the AOL or the Prodigy to content  
17 that is stored on other computers, whether it is  
18 somebody's web server, whether it is an FTP  
19 server, whether it is a database stored someplace  
20 else.

21 Q And you might link to those other computers  
22 through the internet?

23 A Correct. You would use -- your computer talks  
24 internetworking protocol which let's you get  
25 information from a remote computer by typing in an



1 address, whether it is IP address or whether it is  
2 a name like www.touchnet.com.

3 Q Any content that I might want to access is  
4 contained on individual web sites with respect to  
5 the world wide web; is that a correct statement?

6 A Correct. Information is on computers out there  
7 just like information was on Prodigy's computers.  
8 Information is on, you know, company's computers  
9 and you can use internetworking protocols to  
10 access that data.

11 Q And so there is actually, with respect to the  
12 routing computers which make up the internet, no  
13 content on those computers; is that correct?

14 A Correct. Generally, the computers that route the  
15 requests, their job is to route the requests in  
16 packets of data to the computers that store the  
17 data; the computer that stores the data then gives  
18 it back and that data is routed through a network  
19 of computers and that is what is known as the  
20 internet.

21 Q Okay. Back in 1992 and '93, your computers, your  
22 TouchNet kiosks were able to connect to Prodigy;  
23 is that correct?

24 A Correct.

25 Q At that time, they couldn't connect to the





1 internet through Prodigy because the internet  
2 didn't exist; is that correct?

3 A The internet as we know it today was not -- the  
4 internet as we know it today as an entity did not  
5 exist. The internet in 1992 and 1993 generally  
6 was used to transfer files between military bases  
7 and universities and it used a bunch of different  
8 protocols. So the public was not using the  
9 internet in 1993. But it was just a matter of  
10 time to be able to then have access to those  
11 computers. I mean, it was -- our design was to be  
12 able to access information anywhere it was stored.

13 Q The system that TouchNet had available in 1993  
14 could connect to Prodigy, correct?

15 A Correct.

16 Q Is there any difference between the system  
17 connecting to Prodigy in 1993 and the system  
18 connecting through Prodigy and to the internet  
19 today assuming Prodigy existed today?

20 A No.

21 Q There is no technical difference in the equipment?

22 A The equipment is the same, different protocols may  
23 be used to be able to access the data that is  
24 stored on other places.

25 Q And is the internet responsible for those



1 protocols?

2 A Well, the internet protocol has become the de  
3 facto standard of how computers talk. So how we  
4 talked to Prodigy in 1993 was a de facto standard  
5 to talk to Prodigy in 1993. As TCP/IP became  
6 widespread, that became the de facto way of  
7 communicating among different systems. We had the  
8 ability of talking to Prodigy and if Prodigy used  
9 TCP/IP, we could have done it that way also.

10 Q With respect to using the internet, the only  
11 entity that could charge you for a pay per use  
12 service was an on-line service; is that correct?

13 A Correct.

14 Q The internet can't charge you itself?

15 A Correct.

16 Q There is no one operating it, the internet, as a  
17 commercial entity to charge you for the service?

18 A Correct.

19 Q In fact, what you refer to as the internet is  
20 merely just another connection mode that can be  
21 accessed through your on-line service provider; is  
22 that correct?

23 A Correct.

24 Q And you kind of shrugged there. Don't let me put  
25 words in your mouth if you want to expand on that.



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1           A    The issue is providing access to data on other  
2               computers requires some sort of networking  
3               protocol. The internet -- there is no -- there is  
4               no entity called the internet. The internet is a  
5               collection of computers that can talk to each  
6               other. What we do is we can provide pay-per-use  
7               access to Prodigy in 1993 that could provide  
8               access to data on other computers, essentially the  
9               same thing that the internet -- what is now known  
10              as the internet is.

11          Q    So in your opinion, is there any difference  
12               between this system TouchNet had operating in 1993  
13               and how it functioned to connect to commercial  
14               on-line services, including the internet if it  
15               were available, as opposed to today when the  
16               internet is available through Prodigy?

17          A    No. I don't see any differences in the intent.  
18               The only difference might be the protocols it  
19               talked when it dialed up or what type of computer  
20               -- what type of computer it dialed to. The  
21               service, the access to information on an on-line  
22               service that we had in 1993 is essentially the  
23               same thing we have today.

24          Q    But when you say there is a difference in how you  
25               connect, wouldn't that be different for how you



1 connect through Prodigy to Telnet to Gopher, is  
2 that the difference you are referring to?

3 A Telnet and Gopher are services that were other  
4 pre-world wide web services that were available  
5 for computers that were using the internet. And  
6 our service could have used those also. I'm not  
7 sure I am answering --

8 Q Those services existed back in 1993?

9 A Yes, they did.

10 Q And you could have connected to those services  
11 through Prodigy?

12 A If Prodigy had a -- if Prodigy had that available.  
13 And I don't know for a fact that they did, but  
14 they do now. And America On-Line does now. And  
15 they are essentially a list of services that are  
16 available to on-line users and on-line users can  
17 use what people term the internet.

18 Q Just like they could have used Gopher or Telnet  
19 back in '93?

20 A Yes.

21 Q It is just another means for connecting to these  
22 different services; is that correct?

23 A Yes.

24 Q It is not a service in and of itself, the internet  
25 that is?



1 A Right. The internet is not a service.

2 Q And there is no internet company to charge you on  
3 a pay-per-use basis for that service, is there?

4 A Correct. There is no -- the internet is not an  
5 entity that charges.

6 Q So today if somebody wanted to connect to the  
7 internet through a company like Prodigy or  
8 CompuServe, it is no different than it was in  
9 1993?

10 A Correct.

11 MR. STITT: I'm done.

12 FURTHER EXAMINATION

13 BY MR. POLASEK:

14 Q Except to the extent that you couldn't connect to  
15 the internet in 1993 through Prodigy, correct?

16 A I don't know that for a fact.

17 Q Okay. Well, then when you say there is no  
18 difference, I mean, it is hard to say that in 1993  
19 there was no difference in accessing Prodigy and  
20 accessing the internet through Prodigy if you  
21 don't know that you could have accessed the  
22 internet through Prodigy in 1993?

23 A Well, as I said earlier, Prodigy uses a lot of  
24 different -- I'm not an expert on Prodigy's  
25 back-end system, but Prodigy offered many services



1 that included access to remote computers, it  
2 included access to airline tickets and shopping  
3 and e-mail. It included all of these things. And  
4 so Prodigy's computers had to talk to other  
5 computers and it's my -- it is my contention that  
6 they used services, internet protocol services to  
7 do that.

8 Q But they were -- it is your testimony that they  
9 were able to talk to discrete or specified  
10 computers, OAG or the Kansas City newspaper or  
11 something of that nature, correct? I mean, they  
12 were specified and it was what Prodigy dictated?

13 A Our kiosk could talk to many different types of  
14 computers. It could talk to specific services  
15 like OAG or it could talk to a service like  
16 Prodigy which could talk to anything else that  
17 Prodigy could talk to. And in 1993, Prodigy was  
18 an on-line service that accessed a lot of  
19 different computers, essentially what we know as  
20 the internet today.

21 Q So you are saying that in 1993 Prodigy accessed a  
22 network of computers that is the same as what we  
23 consider the internet to be today?

24 A No. What I'm saying is in 1993 Prodigy was a  
25 public access to information that was stored on



1 computers all across the country. And they may  
2 have used these protocols, that we now  
3 colloquially call the internet today. So a user  
4 at our kiosk could access Prodigy and from Prodigy  
5 they could access other services that were not  
6 stored on Prodigy, just like today a user could  
7 access America On-Line and then go out over the  
8 web to get information from other terminals. In  
9 1993, nobody knew what the internet was and so  
10 essentially we provided access to what became  
11 commonly known as the internet.

12 Q And one of the things you said is that they may  
13 have had or may have used these connections,  
14 correct?

15 A Correct. I said that, but I don't have knowledge  
16 of how Prodigy architected their backbone or their  
17 systems.

18 MR. POLASEK: Okay. That is fine. Do  
19 you have any more?

20 MR. STITT: No.  
21  
22  
23  
24  
25



(Witness excused.)

\_\_\_\_\_  
JOHN F. MURPHY

Subscribed and sworn to before me this \_\_\_\_\_  
day of \_\_\_\_\_, 19 \_\_\_\_.

My commission expires \_\_\_\_\_.

\_\_\_\_\_  
Notary Public within and for  
\_\_\_\_\_ County, \_\_\_\_\_.

Mettke, Richard P. vs. TouchNet Information Systems



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## CERTIFICATE

STATE OF MISSOURI )  
 ) ss.  
COUNTY OF JACKSON )

I, LYDIA HURLEY, Registered Professional Reporter and Notary Public, do certify that pursuant to Notice, at the law offices of Spencer, Fane, Britt & Browne, 1400 Commerce Bank Building, 1000 Walnut, in the City of Kansas City, in the County of Jackson and State of Missouri,

JOHN F. MURPHY,

came before me, was duly sworn to testify the whole truth of his knowledge of the matters in controversy aforesaid, was examined and his examination then written in stenotype by me and afterward typed, and subscribed by the witness as hereinbefore set out, on the day in that behalf aforesaid; and said deposition is herewith returned.

I further certify that I am not counsel, attorney or relative of either party, or clerk or stenographer of either party or of the attorney of either party, or otherwise interested in the event of this suit.

IN WITNESS WHEREOF, I have hereunto set my seal at my office in said County and State, this 23rd day of June, 1998.

My commission expires January 6, 2000.

*Lydia Hurley*  
\_\_\_\_\_  
Notary Public

RPR





June 23, 1998

Mr. Richard P. Stitt  
Spencer, Fane, Britt & Browne  
1000 Commerce Bank Building  
Suite 1400  
Kansas City, Missouri 64106

Re: Richard P. Mettke, vs. TouchNet Information  
Systems, Inc., No. 98-PT-596-E

Dear Mr. Stitt:

Enclosed you'll find the original signature pages and  
copies of the depositions of Daniel J. Toughey and  
John F. Murphy for them to read and sign.

If there are any changes necessary, please have  
the witnesses make those changes on the correction  
sheets which have also been provided for that purpose.

After the witnesses have read their transcript, please  
have them sign their original signature page and  
correction sheet before a notary public and return  
them to our office for filing.

If we have not received the signed documents within 30  
days of your receipt of them, the depositions will be  
filed without signature.

Thank you for your help in this matter.

Sincerely,

*Lydia Hurley*  
Lydia Hurley, RPR

cc: Mr. John T. Polasek

# AFFIDAVIT

COUNTY OF JACKSON )  
 ) ss;  
STATE OF MISSOURI )

I, the Undersigned, do hereby certify that the signature page, along with a copy of the deposition, was submitted to the witness and/or the attorney of record for the witness to read and sign said deposition.

That, as of this date, the said witness and/or attorney of record have not returned the signed copy of the signature page pursuant to stipulation, and the deposition is herewith filed without the signature of the witness.

Lydia Hurley

Subscribed and sworn to before me, this 27<sup>th</sup> day

of July, 1978.

~~My commission expires:~~

Carrie Turner

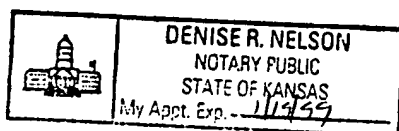
Notary Public in and for  
Jackson County, Missouri

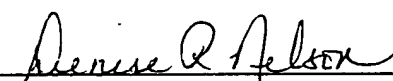
**Carrie Turner**  
**Notary Public-Notary Seal**  
**State of Missouri**  
**Jackson County**  
**My Commission Exp. 06/18/2001**

(Witness excused.)

  
JOHN F. MURPHY

Subscribed and sworn to before me this 27th  
day of July, 19 98.  
My commission expires 1/19/99.



  
Notary Public within and for  
Johnson County, Kansas.

Mettke, Richard P. vs. TouchNet Information Systems



TO: BOWEN MOTTER REPORTING  
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Kansas City, MO 64105

RE: \_\_\_\_\_

DEPOSITION TAKEN ON: \_\_\_\_\_

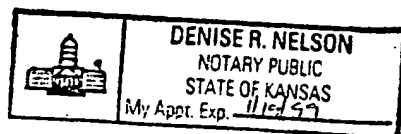
Pursuant to the rules, I have reviewed my deposition and wish that the following corrections be appended for the reasons stated below.


Page	Line	Change Requested	Reason for Change
28	5	Change the word "we" to "I"	It was my personal recommendation in the Discussion of the pricing strategy, not "we" meaning as TouchNet
28	6	Change the word "made" to "recommended"	The reason for the change is that it was my recommendation to Prodigy that the service be put on the machines at no charge to build traffic. It was my recommendation to Prodigy on the pricing strategy. TouchNet did not make the decision for Prodigy.
28	9	Change "We" to "Prodigy"	This was a group discussion/decision. As this line shows, the decision could have been made to charge or not to charge by Prodigy, if they chose to charge for the service.

  
\_\_\_\_\_  
Witness Signature

Subscribed and sworn to before me this 27<sup>th</sup> day of July,  
1998.

My commission expires 11/19/99.



  
\_\_\_\_\_  
Notary Public  
County of Johnson  
State of Kansas